IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1059 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

HONOURABLE MR.JUSTICE M.R. SHAH

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

STATE OF GUJARAT
Versus
AJITSINH KABHSINH RATHOD & ORS

==========

Appearance :
MR KP RAVAL APP for Appellant
MR SUNIL S JOSHI for Respondents

==========

CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HONOURABLE MR.JUSTICE M.R. SHAH

Date : 28/11/2007

ORAL JUDGMENT :(Per : HONOURABLE MR.JUSTICE J.R.VORA)

1 Instant Appeal is preferred by the State under Section 378 of the Code of Criminal Procedure, against the judgment and order dated 31st of December, 2004, delivered by learned Additional Sessions Judge, 7th Fast Track Court, District – Panchmahal at Godhra, in Sessions Case No. 318 of 2003, whereby all the six respondents herein, being accused of the Sessions Case, came to be acquitted for the offences punishable under Sections 395 and 397 of the Indian Penal Code.

2 Learned APP Mr. K.P. Raval, on behalf of the appellant – State, was heard. Leave to Appeal granted. Appeal is Admitted. Learned Advocate Mr. Sunil S. Joshi for the respondents - accused waives service of admission.

3 Learned APP Mr. K.P. Raval, for the appellant – State and learned Advocate Mr. Sunil S. Joshi, for the respondents, requested this Court to hear the matter finally as the record and proceedings of the Trial Court is available with the Court and that both learned counsels assured to provide extra copies of the evidence recorded during the trial and the documents produced. In the facts and circumstances of the case, granting request of learned counsels, the matter is taken up for final hearing.

4 A complaint has been filed by Narendraprasad Devshankar Upadhyaya, the then working in Irrigation Department of the Public Works Department at Kheda. According to him, at the time of incident, he was staying at Godhra, Samratnagar, Bamroli Road. He had one Maruti Van Vehicle, bearing No. GJ-17-V 035 of white colour, which he had purchased from accused No.1 Ajitsinh Kabhsinh Rathod, for Rs. 90,000/-, on 21st of August, 1998, in the name of his wife Niranjanben. According to contract, if the seller pays full amount paid to him, the vehicle was again to be entrusted to the seller and, therefore, the said vehicle was in the name of the seller in the record of registration and the responsibility of the insurance policy was upon the seller - accused No.1. On the day of the incident i.e. 8.10.1999, the complainant was on duty and returned home at 6.00 p.m. When he reached at his house, his daughter Nimishaben and son-in-law Mehulkumar, husband of Nimishaben, conveyed to him that, at their residence, 10 to 12 persons had come in two jeep cars, and with duplicate keys, had taken away maruti van car which the complainant had purchased from accused No.1. Nimishaben attempted to prevent the vehicle being taken away, and on her shouting, her husband Mehulkumar and other persons came to the spot. Mehulkumar seized the key from the said vehicle and, therefore, four persons got down from one jeep and after threatening, recovered keys of the vehicle. They pushed Mehulkumar,

who had fallen on the ground and threatened him to kill. Meghnaben, niece of the complainant was slapped by the above persons and thereafter all those persons went towards B.B. Gandhi Petrol Pump. According to the complainant, all the persons, who had come to capture vehicle, had weapons like dharia, axe etc. The incident took place between 17.00 and 18.00 hours. This complaint was registered before Godhra Town Police Station, vide Crime Register No. I-343/99, at about 19.45 hours. A charge sheet came to be submitted in the court of learned JMFC and the case was committed to the Court of Sessions and was made over to the Trial Court. The Trial Court framed charges against the accused, vide Exhibit-6, on 7th of June, 2004, to which each of the accused pleaded not guilty and, hence, they were put to the trial. Prosecution examined following 10 witnesses and produced documents on record to prove its case.

1. PW-1 Salmasinh Adesinh Bariya, Exh. 16
2. PW-2 Sursinhbhai Chhatrasinh Rathod, Exh. 18
3. PW-3 Narendraprasad Devshankar Upadhyaya, Exh.22
4. PW-4 Vaishaliben Narendraprasad Upadhyaya, Exh.29
5. PW-5 Mehulkumar Natvarlal Raval, Exh.30
6. PW-6 Amarsinh Rumarbhai Bamaniya, Exh. 31
7. PW-7 Mansurhusain Anvarmiya Khokhar, Exh. 32
8. PW-8 Vitthalbhai Haribhai Patanvadiya, Exh.33

9. PW-9 Vinaychandra Ramshankar Pandya, Exh. 34

10.PW-10 Masurbhai Lalabhai Vagadiya, Exh. 36

On evidence being over, the Trial Judge recorded the further statement of the each of the accused under Section 313 of the Code of Criminal Procedure. After denying the evidence of the prosecution in toto, accused No.1 stated that, the vehicle in question was given to the complainant by him for one year through bailment contract. They denied to lead any evidence. The learned Trial Court, after hearing the prosecution and defence as well and came to the above conclusion to acquit all the accused and, hence, this Appeal.

5 Learned APP Mr. K.P. Raval, on behalf of the appellant and learned Advocate Mr. Sunil S. Joshi, for the respondent were heard in detail in respect of this Appeal.

6 We have gone through the record and proceedings thoroughly and threadbare. We have considered all relevant aspects of the matter and reasonable probability arising out of the circumstances of the matter and essential features. Though this is an appeal against the acquittal, we have re-appreciated the evidence recorded during the trial and have scanned the reasons assigned by the Trial Court for

acquitting the accused for the above said charges.

7 Turning to the evidence as recorded during the trial, PW-3 Narendraprasad Devshankar Upadhyaya - complainant stated that he had obtained the car on bailment agreement from accused No.1. He produced on record, vide Exhibits 23 and 24, respective agreements entered into by the accused with them. According to the complainant, after one year of the said agreement, his wife informed by letter to accused No.1 to renew the insurance policy, which was to be expired on 3rd of August, 1999, and instead of renewing the insurance policy, on 8th of October, 1999, the accused came to them and the above incident occurred, in which the accused looted the vehicle forcibly from the possession of the complainant and his family. He was informed by Nimishaben about the incident. He produced on record, vide Exhibit–26, the complaint, which he filed before the police. In examination-in-cross, though he stated that his wife was doing agricultural work, but he was not able to produce any record in this respect nor was he prepared to show that how the amount of Rs. 90,000/- which he paid to the accused was managed by him.

Vaishaliben Narendraprasad Upadhyaya, PW-4, examined at Exhibit–29, happened to be daughter of the complainant and an eye witness. She stated that, before the incident, she did not know the

accused or the persons who looted the car from their possession. According to her, at 5.00 to 5.30 p.m. persons had come, and with duplicate keys, two persons took away the said vehicle. Out of them, she identified accused Nos. 1 and 2 before the court. She attempted to prevent the above said act of the accused, but accused stated that, they had no right over the said vehicle and, therefore, she called Nimishaben and her husband Mehulkumar. According to the witness, the persons had hockey, sticks etc with them. When her father came, she conveyed this fact to him. In examination-in-chief, she stated that the person who was driving the car, pushed Mehulkumar, who fallen on the ground and one of the persons had slapped Meghnaben. In examination-in-cross, Vaishaliben stated that, she had stated before the police that two persons, who had come to her residence, were appearing like villagers, but she did not know the persons.

PW-5 Mehulkumar Natvarlal Raval, examined at Exhibit 30, according to him, the incident took place on 8th of October, 1999 and at about 5.30 p.m. while he was playing cricket in the open ground at Samratnagar, he had heard shouts and, therefore, he went to the house of his father-in-law. He noticed that 3 or 4 persons were taking away Maruti van vehicle and he stated that he could not see that who was driving the said vehicle and who was sitting besides him. He

attempted to stop the car, but the persons, who were sitting in the back side of the car, opened the door and when he noticed dharia and sword in the car, he was frightened and he allowed the car to go. According to him, he could not identify the persons, who had taken the maruti van. He has been cross-examined in detail by the prosecution.

PW-6 Amarsinh Rumalsinh Bamaniya, who was working as PSO and examined at Exhibit–31, stated that he had recorded the complaint given by the complainant, which is produced at Exhibit – 26. PW-7 Mansurhusain Anvarmiya Khokhar, is the first Investigating Officer, who investigated the incident. PW-8 Vitthalbhai Haribhai, examined at Exhibit–38, who had initially taken charge of the investigation. PW-9 Vinaychandra Ramshankar Pandya, examined at Exhibit–34, is panch of panchnama at Exhibit- 35 of the scene of offence, but he has not supported the same. PW-10 Masurbhai Lalabhai Vagadiya, examined at Exhibit–36, was concerned PI, who was also entrusted with the investigation on 8th of October 1999 of this crime. Salmasinh Adesinh Bariya, PW-1, examined at Exhibit-16, is panch of panchnama Exhibit-17, by which concerned maruti van vehicle was seized from accused No.1. This panchnama is on record at Exhibit–17, but PW-1 Salmasinh Adesinh Baria, did not support the said panchnama, in any respect. PW-2 Sursinhbhai Chhatrasinh

Rathod, examined at Exhibit–18, is the second panch of panchanama Exhibit–17 and he has also not supported the prosecution case.

8 This is all the evidence of the prosecution.

9 While we re-appreciated the evidence on record, it transpires that the complainant is not an eye witness. The facts stated by him about the bailment agreement, by which he had hired the said vehicle, appears to be doubtful, particularly, when he was not able to state how he obtained Rs. 90,000/- which he paid to accused No.1, though a receipt is produced on record at Exhibit – 24. Contradictions in the complaint and in the deposition about the agreement entered into between the wife of the complainant and accused No.1 has been brought on record and accordingly he did not state in his complaint that he paid Rs. 90,000/- to accused No.1 and had obtained receipt. He had not stated in the complaint about the letter issued by his wife on 3rd of October, 1999 about the renewal of the insurance policy of the maruti van. These contradictions are proved in the evidence of PSO Amarsinh Rumarbhai Bamaniya, PW-6, examined at Exhibit 31. While other material witness Vaishaliben is an eye witness, but cannot be believed about the identification of the accused. Though we found contradictions in her deposition, as narrated by the Trial Court in the judgment impugned,

but it clearly borne out that, so far as identification of the accused is concerned, this witness cannot be relied upon. Admittedly, the witness could not identify the accused at the time of the incident and stated before the police that the person who came at the time of the incident to seize maruti van appeared like villagers. No T.I. parade has been held by the Investigating Agency. After five years of the incident, the identification of the accused Nos. 1 and 2 by this witness, definitely, does not inspire any confidence. There are contradictions in the evidence of Vaishaliben and Mehulkumar. While Mehulkumar, in contradictions to what has been stated by Vaishaliben, deposed that on hearing shouts, he went to the house of his father-in-law and attempted to prevent seizing of maruti van car. He did not state that he was pushed by the accused and had fallen on the ground, instead, he stated that, from the back side of the car, somebody opened the door and the witness noticed a dharia and, therefore, he was frightened and allowed the car to take away. In any case, this witness was not able to identify the accused at the time of the incident nor before the Court. These are the only three effective witnesses examined by the prosecution to prove its case. Other witnesses are the police officers and panchas, and panchas have not supported the prosecution case. Out of the three effective witnesses, complainant is not an eye witness, while, as above stated, Vaishaliben, is not reliable witness as to the identification of the

accused, while witness Mehulkumar was not able to identify the accused at all. This is, in brief, the prosecution case.

10 However, when we scrutinized the record, we found that, in this case, very important witness Nimishaben, wife of Mehulkumar Natvarlal Raval and Meghnaben, daughter of Bharatkumar Devshankar Upadhayaya, and Niranjanben, wife of Narendraprasad Devshankar Upadhyaya, were present at the time of the incident, but none of them has been examined by the prosecution. It is noteworthy that, in the charge sheet, these witnesses have been shown as witnesses, but, however, without any reason, the prosecution thought to drop these witnesses. A serious note is required to be taken that Meghnaben, shown as witness in the charge sheet, according to the prosecution case, was slapped by the person, who seized the maruti van vehicle, even though, she has not been examined. What we found from the record is a purshis at Exhibit 37 produced by the concerned APP to the effect only that they declared their evidence to be closed. No reasons have been assigned by learned APP that why the material witnesses were not examined. True it is that, it is the prerogative of the prosecution that how many witnesses are to be examined on behalf of the prosecution and which witnesses are to be examined. Even then, in the interest of justice, it becomes the duty of the APP In-charge of the prosecution to

see that the case of the prosecution is attempted to be proved by cogent and best evidence. In the facts and circumstances of the case, we found that very material witness Meghnaben, who had been slapped by the person who had seized the maruti van vehicle, could not be examined by the prosecution or no reason, whatsoever, was assigned. At last, we are unable to find any reason on behalf of the prosecution that why the learned APP In-charge of the prosecution thought it fit not to examine any of other three material witnesses. The Trial Court also has passed very formal order of recording of that purshis. It clearly appears that the learned APP ought to have applied mind to the evidence recorded and the prosecution case properly, and the court also, instead of being spectator of the trial, was required to see that the justice is done. In any case, we do not find that any useful purpose would be served now to direct the prosecution to examine those witnesses as the incident had taken place in 1999. However, it clearly transpires that the prosecution has dropped the material witnesses.

11 In view of the above discussion and re-appreciation of the evidence, we also come to the conclusion that the prosecution failed to prove the case against the accused beyond reasonable doubt. The complainant was examined, was not an eye witness and other two witnesses fails to bring home the guilt of the accused. The learned Trial

Judge, therefore, properly appreciated the evidence on record and came to the correct conclusion. The verdict arrived at by the Trial Court of acquittal is possible and probable view, which could be taken from the evidence recorded.

12 This is an appeal against the order of acquittal and it is well established that the orders of acquittal cannot be interfered with lightly only because the second view is possible from the same evidence. It is well settled law that unless it is found that the conclusions arrived at by the Trial Court are perverse, manifestly erroneous, palpably wrong and demonstrably unsustainable, no interference is permitted in the order of acquittal. In no case, the reasoning assigned by the Trial Court and conclusions arrived at, can be labelled as perverse or unsustainable. In this view of the matter, following final order is passed :

"Appeal stands dismissed".

(J. R. VORA, J.)

(M. R. SHAH, J.)

pnnair